Dated: July 07, 2008

Lawrence S. Walter
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

In re: LUZ G. MUNOZ, *Debtor*	Case No. 05-34522 Adv. No. 07-3216
LUZ G. MUNOZ, *Plaintiff* v. SALLIE MAE, INC., ET AL., *Defendants*	Judge L. S. Walter Chapter 13

DECISION DENYING DEFENDANT EDUCTIONAL CREDIT MANAGEMENT CORPORATION'S MOTION TO DISMISS

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the General Order of Reference entered in this District. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

This matter is before the court on Educational Credit Management Corporation ("ECMC")'s Motion to Dismiss for Lack of Subject Matter Jurisdiction [Adv. Doc. 9]. Although ECMC was not formally made a party to this adversary proceeding at the time the motion to dismiss was filed, the court subsequently ordered ECMC to be substituted as a real party in interest for Defendant United Student Aid Funds, Inc. which assigned its loans to ECMC [Adv. Doc. 10]. Upon the substitution of ECMC as a defendant in this adversary proceeding, the court granted additional time to Plaintiff-Debtor Luz G. Munoz ("Debtor") to file a response to ECMC's motion. No response has been filed and the matter is ready for a determination.

BACKGROUND

Defendant ECMC has filed its motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Bankr. P. 7012(b)(1). ECMC argues that the adversary proceeding initiated by the Debtor through the filing of a complaint on September 5, 2007 to discharge her student loan debts is not ripe for adjudication. According to ECMC's argument, the Debtor must wait until the date of her bankruptcy discharge or immediately prior to obtain a determination on her student loans. Pertinent to ECMC's argument are the following facts. The Debtor filed her Chapter 13 bankruptcy petition on May 9, 2005. The Debtor's plan was confirmed on September 14, 2005. It was modified by order dated March 9, 2007 to extend the plan's length to a period of 60 months. As a result, the Debtor will not finish the plan and be entitled to a discharge until 2010.

LEGAL ANALYSIS

One difference between a Chapter 7 and Chapter 13 case is the time it takes for a debtor to be eligible for a discharge. In Chapter 13, a debtor generally does not receive a discharge until she completes the terms of her Chapter 13 plan after a period of three to five years. 11 U.S.C. § 1328(a). ECMC argues that because a judicial determination discharging student loans is not

effective until the date the Debtor receives her Chapter 13 discharge, there is no "case or controversy" to adjudicate until that date. Consequently, because the Debtor in this student loan adversary proceeding will not be eligible for a discharge until 2010, ECMC argues that the matter is not ripe and the complaint should be dismissed.

The issue of when a student loan dischargeability complaint filed early in a Chapter 13 case is ripe for adjudication has been raised by educational lenders in bankruptcy cases across the country and courts have responded with conflicting results. After a thorough review of the conflicting authorities, this court agrees with the position of his colleagues in the Southern District of Ohio and determines that the issues presented by the Debtor in this adversary proceeding are ripe for review.

The ripeness doctrine "is rooted both in the limits of Article III of the Constitution and 'on discretionary reasons of policy.'" *Bender v. Educ. Credit Mgmt. Corp. (In re Bender)*, 368 F.3d 846, 847 (8th Cir. 2004) (further citations omitted). Article III of the Constitution charges federal courts with the resolution of "cases and controversies" and precludes them from rendering advisory opinions. *Id.* Courts also use the ripeness doctrine for policy reasons to avoid wasting scarce resources to resolve speculative or indeterminate factual issues. *Id. See also National Rifle Assoc. of America v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997) (noting that the basic rationale of the ripeness doctrine is to "prevent the courts, through premature adjudication, from entangling themselves in abstract disagreement"). In *Magaw*, the Sixth Circuit noted factors courts should weigh in deciding whether a matter is ripe for review including: 1) the hardship to the parties if relief is denied at the present stage; 2) the likelihood that the harm alleged by the plaintiff will come to pass; and 3) whether the factual record is sufficiently developed to produce a fair adjudication. *Magaw*, 132 F.3d at 284.

To analyze whether a Chapter 13 student loan dischargeability proceeding is ripe for determination, some background is necessary. First, as noted above, a Chapter 13 debtor generally obtains a discharge only after successful completion of her plan which takes three to five years to complete. 11 U.S.C. § 1328(a). Student loan debts are not ordinarily discharged in a Chapter 13 case. *Id.* In order for a debtor to obtain a discharge of student loans as part of the general Chapter 13 discharge, a debtor must file an adversary complaint and obtain a ruling that payment of the loans constitutes an "undue hardship." *See* 11 U.S.C. § 523(a)(8). In the Sixth Circuit, an undue hardship analysis requires courts to consider: (1) whether the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans. *Barrett v. Educ. Credit Mgmt. Corp. (In re Barrett),* 487 F.3d 353, 359 (6th Cir. 2007) (citing *Brunner v. New York State Higher Educ. Serv. Corp.*, 831 F.2d 395, 396 (2nd Cir. 1987)).

Applying the ripeness doctrine in the context of a Chapter 13 student loan dischargeability proceeding, some courts have agreed with ECMC's position and dismissed an adversary complaint filed in the early stages of a debtor's bankruptcy case. In *Bender*, the Eighth Circuit concluded that a Chapter 13 debtor's complaint filed four months after her and her husband's bankruptcy petition was filed and three and a half years before they would be eligible for a discharge was not ripe for review. 368 F.3d at 847-48. The Eighth Circuit noted that ruling on the dischargeability of student loans requires courts to consider whether repayment of the student loans after the discharge would constitute a financial undue hardship on the debtors, an issue that is speculative and remote three and a half years prior to the discharge date. *Id.* at 848. Furthermore, the Eighth Circuit determined that there would be no prejudice to the debtors

because they were protected by the automatic stay from any collection actions by the creditor while the bankruptcy progressed. *Id.* Other courts have similarly reasoned that a determination of whether a debtor can afford to repay student loans is premature until the debtor's Chapter 13 discharge or immediately prior. *See, e.g., Pair v. U.S. (In re Pair),* 269 B.R. 719, 721 (Bankr. N.D. Ala. 2001) (concluding that a student loan adjudication is not ripe until approximately six months prior to the end of a Chapter 13 case when the *Brunner* factors including a debtor's financial circumstances are clearer); *Walton v. Sallie Mae Educ. Credit Fin. Corp. (In re Walton),* 340 B.R. 892, 895 (Bankr. S.D. Ind. 2006).

Other courts, including some in the Southern District of Ohio, take a different view. These courts decline to make a hard and fast rule that would preclude a bankruptcy court from entertaining a student loan dischargeability proceeding until at or near the end of a debtor's Chapter 13 case. *See Ekenasi v. Educ. Res. Inst. (In re Ekenasi),* 325 F.3d 541 (4th Cir. 2003); *Hoffer v. Am. Educ. Serv. (In re Hoffer),* 383 B.R. 78 (Bankr. S.D. Ohio 2008); *Strahm v. Great Lakes Higher Educ. Corp. (In re Strahm),* 327 B.R. 319 (Bankr. S.D. Ohio 2005). The court agrees with their position and finds that debtors may choose the time at which to file their dischargeability complaint during their Chapter 13 cases.

Significantly, there is no timing requirement placed on when a debtor must file her dischargeability complaint within the relevant statutory provisions of 11 U.S.C. § 523(a)(8) and § 1328(a). *Ekenasi*, 325 F.3d at 547; *Strahm*, 327 B.R. at 321. Indeed, the Federal Rules of Bankruptcy Procedure contemplate that such a complaint may be filed by the debtor "at any time." Fed. R. Bankr. P. 4007(b). *See also Strahm*, 327 B.R. at 321.

Furthermore, while determining a debtor's future financial circumstances may be more difficult in the early stages of a chapter 13 case, it is not necessarily impossible. *Hoffer*, 383 B.R. at 81 (noting that "there can be circumstances where the pertinent factors can be predicted

with sufficient certainty prior to conclusion of the chapter 13 plan"). Courts are often required to make financial projections about a debtor's future in their rulings. *Id.* at 83 (providing a list of proceedings requiring bankruptcy courts to make forward-looking evaluations). Indeed, the *Brunner* factors, including the determination as to whether a debtor's financial hardship will persist for a significant portion of the student loan repayment period, "always requires the court to consider a future time period where certainty is never available, whether evidence in regard to this factor is presented in the early stages, or the later stages, of a chapter 13 case." *Strahm*, 327 B.R. at 322.

In addition, declining to exercise jurisdiction over the student loan adversary proceeding early in the case could result in serious harm to the debtor. *Hoffer*, 383 B.R. at 82. First, certain options such as plan modifications and payment of fees and costs through a plan, may become available to a debtor if a student loan adversary proceeding is adjudicated early in a bankruptcy case. *Id.; Strahm*, 327 B.R. at 325 n.2. In addition, an adversary proceeding, like any litigation, can be an elongated affair taking six months to a year to complete. *Hoffer*, 383 B.R. at 82. If a debtor is forced to wait until at or near the time of her discharge to file an adversary complaint, she stands to lose the protection of the automatic stay if the discharge is entered while awaiting trial and the trial would also delay the closing of her bankruptcy case to her detriment. *Id.* (noting the "almost insurmountable hurdle" created by a pending bankruptcy case including the inability to re-establish credit, obtain a loan or even rent an apartment until the bankruptcy case is closed).

On the other hand, the court can contemplate no serious harm to the creditor if the court exercises jurisdiction over a student loan adversary proceeding early in the case. Indeed, ECMC mentions no harm that will befall the creditor if its motion to dismiss is denied. Rather than harm to the creditor, it is a debtor who must weigh competing risks when filing her

dischargeability complaint early in a Chapter 13 case. As noted in several cases, it may be difficult for a debtor to carry her burden of proving, with the requisite certainty, that repayment of student loans will be an undue burden for a significant portion of the repayment period if the debtor chooses to make that claim far in advance of the expected completion date of the plan. *Ekenasi*, 325 F.3d at 547; *Strahm*, 327 B.R. at 323-24 (cautioning debtors that presentation of the issues in an earlier, rather than a later, stage of their Chapter 13 case may be disadvantageous to them). Nonetheless, it is for the debtor to decide when it is appropriate to file the dischargeability complaint by weighing the risk that her future finances will be too speculative to carry her burden of proof against her need for a swift determination.

While it is true that a significant percentage of Chapter 13 cases fail prior to a discharge, which would make a judicial determination of dischargeability moot, there are measures in place at the time of confirmation to help assure the court and creditors of the feasibility of the plan and the likelihood it will complete successfully. *Hoffer*, 383 B.R. at 83. As insightfully noted by Judge Preston in the *Hoffer* case,

> The fact that future events or circumstances may derail a debtor's efforts does not make the dischargeability issues less ripe. If that were the standard, the issues surrounding many of the debtor's remedies in the bankruptcy environment would fail to ripen sufficiently for adjudication, thereby severely impeding efficient and timely administration, or even success, of bankruptcy cases. For example, valuation of assets with concomitant bifurcation of claims . . . and avoidance of liens are issues that are determined in the context of the plan, but the effect of the orders of the court on such issues are subject to successful conclusion of the plan and issuance of the discharge.

Id. at 83. Judge Preston concludes that "the determination of dischargeability of educational loans in Chapter 13 should be available to a party in interest at any stage of a chapter 13 case." *Id.*

The court notes that even if ripeness is a concern at the very earliest stages of a Chapter 13 case, the Debtor in this case, like the debtors in *Hoffer,* is long past that stage. In *Hoffer,* the debtors had completed more than half of their payments required by the plan and were on track

to receive their discharge in sixteen months. *Id.* Similarly, the Debtor herein is more than half way through her Chapter 13 plan and is on track to receive a discharge in 2010. Furthermore, given that ECMC has yet to file an answer in this adversary proceeding, any actual trial and adjudication of the Debtor's dischargeability complaint is still an undetermined future event that will occur even closer to the Debtor's actual date of discharge. The court perceives no benefit to be gained from any further delay of an adjudication of the underlying issues.

For the foregoing reasons, the court **denies** ECMC's motion to dismiss. ECMC is ordered to file an answer to the Debtor's complaint within ten (10) days of the date of the order entered contemporaneously with this decision.

SO ORDERED.

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